

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 20-0316

JOSEPH MEEKS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BIS SALAMIS, INCORPORATED)	
)	DATE ISSUED: 02/26/2021
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION, LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Supplemental Decision and Order Awarding Fees of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Harold Eisenman, Houston, Texas, for Claimant.

Thomas J. Smith (Galloway, Johnson, Tompkins, Burr & Smith, APLC), Houston, Texas, and Kathleen K. Charvet and Heather W. Angelico (Galloway, Johnson, Tompkins, Burr & Smith, APLC), New Orleans, Louisiana, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Patrick M. Rosenow's Supplemental Decision and Order Awarding Fees (2010-LHC-01263, 2017-LHC-00584) rendered on claims filed pursuant to the Longshore and Harbor Workers' Compensation Act, as

amended, 33 U.S.C. §901 et seq. (Act). The amount of an attorney's fee award is discretionary and will not be set aside unless shown by the challenging party to be arbitrary, capricious, based on an abuse of discretion or not in accordance with law. *Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999).

This case has a long history, commencing with Claimant's injury on April 10, 2009. Following multiple decisions by the administrative law judge and the Board,¹ wherein Claimant was first denied then awarded benefits for his back and tooth injuries, the United States Court of Appeals for the Fifth Circuit reversed the award of benefits for the back injury and affirmed the award of medical benefits to treat the tooth injury. *Bis Salamis, Inc. v. Director, OWCP [Meeks]*, 819 F.3d 116, 50 BRBS 29(CRT) (5th Cir. 2016). Consequently, Claimant was held not entitled to over \$156,000 in compensation Employer had paid, but was found entitled to the approximately \$1,500 in medical expenses for the dental injury.

In 2019, Claimant's counsel filed a fee petition for work performed before the Office of Administrative Law Judges between April 9, 2010, and March 16, 2015.² Claimant's counsel requested a fee of \$97,899.85, representing 171.45 hours of attorney work at an hourly rate of \$510, 75.4 hours of paralegal work at an hourly rate of \$110, and \$2,166.35 in costs. 2019 Fee Petition at 20. Employer responded with objections. Claimant's reply and Employer's sur-reply followed.

The administrative law judge determined Houston, Texas, is the relevant market. He rejected counsel's market rate evidence for various reasons and undertook an investigation of his own of Houston cases, awarding Claimant's counsel an hourly rate of \$435. Supp. Decision and Order Awarding Fees at 6, 8-10 (April 30, 2020) (Fee Order). He then addressed Employer's objections to specific entries, deducting 42.6 hours of attorney time and 20.6 hours of paralegal time. Fee Order at 11-23. The administrative law judge applied *Hensley v. Eckerhart*, 461 U.S. 424 (1983), found Claimant is a

¹ See BRB No. 19-0141 (Feb. 27, 2019); 2017-LHC-00584 (Nov. 19, 2018); BRB No. 15-0148A (Apr. 15, 2015); BRB No. 15-0148 (Feb. 12, 2015); 2010-LHC-01263 (Jan. 29, 2015); BRB No. 13-0478 (July 28, 2014); 2010-LHC-01263 (June 18, 2013); BRB No. 12-0024 (Sept. 27, 2012); 2010-LHC-01263 (Sept. 19, 2011).

² Claimant's counsel had previously filed a fee petition in 2015 for this same period of work. At that time, the administrative law judge declined to address it because the case was on appeal. Because it differed in some respects from the original, he accepted the 2019 petition "as having supplanted" the earlier fee petition. Supp. Decision and Order Awarding Fees at 2-3 n.7 (April 30, 2020) (Fee Order).

prevailing party entitled to an Employer-paid attorney's fee, but concluded Claimant prevailed only in proving entitlement to approximately \$1,500 in medical benefits for his dental injury. As such, Claimant's success was "substantially limited" and warranted a 90% reduction of the requested fee. Fee Order at 25-26. The administrative law judge denied Claimant's requested costs in their entirety for his failure to submit supporting documentation. *Id.* at 23-24. Accordingly, the administrative law judge awarded Claimant's counsel an Employer-paid attorney's fee of \$6,127.75.³

Claimant appeals the fee award. He challenges as an abuse of discretion the reduced hourly rate, the entry deductions, the denial of costs, and the overall 90% reduction for limited success. He primarily asserts his attorney is entitled to his full fee because, over the course of a decade, his attorney succeeded in obtaining over \$156,000 in disability benefits and over \$1,500 in medical benefits. Claimant requests the Board modify the fee award. Cl. Br. at 4, 14. Employer urges affirmance. We reject Claimant's challenges and affirm the administrative law judge's fee award.

An administrative law judge must consider the degree of success and the amount of benefits awarded in assessing an attorney's fee, and they may not be quantifiable until all appeals are exhausted. *Zaradnik v. The Dutra Grp.*, 52 BRBS 23 (2018), *appeal dismissed*, 792 F. App'x 518 (9th Cir. 2020); 20 C.F.R. §702.132. If a claimant is ultimately unsuccessful or obtains only limited success, his attorney is not entitled to a fee or to his full fee. *Hensley*, 461 U.S. 424; *Rossello-Gonzalez v. Acevedo-Vila*, 483 F.3d 1, 5 (1st Cir. 2007) ("It is clear that where an appellate court has reversed a district court's rulings in favor of plaintiffs and has dismissed their case, such plaintiffs cannot be "prevailing part[ies]" because any relief they obtained lacks judicial imprimatur."); *Fagan v. Ceres Gulf, Inc.*, 33 BRBS 91 (1999) (where a claimant's award is reduced due to the employer's appeals, the administrative law judge has jurisdiction to award a new fee consistent with the claimant's ultimate degree of success once the award is final).

In this case, the Fifth Circuit reversed the award of disability benefits which had by then exceeded \$156,000. *Bis Salamis*, 819 F.3d at 130-132, 50 BRBS at 37-39(CRT). While Employer cannot recoup this amount except by offsetting compensation for a future injury, *Ceres Gulf v. Cooper*, 957 F.2d 1199, 25 BRBS 125(CRT) (5th Cir. 1992), Claimant cannot assert the receipt of these funds as a reason for increasing, or not reducing, his attorney's fee. Ultimately, his back injury claim was not successful. Claimant is a

³ Entry reductions resulted in approving 128.85 hours for counsel's time and 54.8 hours for the paralegals' time. Reducing those figures by 90% resulted in a fee for 12.89 hours for counsel and 5.48 hours for the paralegals. 12.89 hours x \$435 = \$5,607.15; 5.48 hours x \$95 = \$520.60; \$5,607.15 + \$520.60 = \$6,127.75.

prevailing party with respect to only the dental claim for medical benefits, and his indemnity windfall cannot be “success.” We reject all assertions to the contrary. *Fagan*, 33 BRBS at 93-94.

Claimant has not shown the administrative law judge abused his discretion or gave insufficient explanation for his award.⁴ *Harmon v. Sea-Land Service, Inc.*, 31 BRBS 45 (1997). Claimant does not challenge any of the administrative law judge’s hourly rate findings – he asserts only that the rate should be increased because of the funds Claimant obtained. We have already rejected that argument. To the extent Claimant is asking the Board to award an enhanced fee for the delay in payment, we reject Claimant’s request. The issue first must be timely raised before the administrative law judge, and it was not. *Van Skike v. Director, OWCP*, 557 F.3d 1041, 43 BRBS 11(CRT) (9th Cir. 2009); *Bellmer v. Jones Oregon Stevedoring Co.*, 32 BRBS 245 (1998); *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995).

With respect to reductions of specific entries, Claimant challenges some of the entries the administrative law judge categorized as unnecessary, vague, clerical, excessive, and block-billed. Fee Order at 11-23. We reject Claimant’s challenges. He has not established the administrative law judge abused his discretion in reducing these hours.⁵ *Welch v. Pennzoil Co.*, 23 BRBS 395 (1990); *Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BR3S 231 (1984).

We further reject Claimant’s assertion that the administrative law judge erred in denying reimbursement of costs. As the administrative law judge explained, Claimant had several opportunities to provide supporting documentation for his expenses but did not do so. Fee Order at 23-24. He incurred the expenses in 2011, he filed his first fee petition in 2015, and he filed his second in 2019. Following Employer’s objections, one of which

⁴ We note Claimant has consistently misread the administrative law judge’s chart with respect to the deductions and approved amounts. Contrary to Claimant’s statements, the deductions were the amounts disapproved, not the amounts approved. As one example, Claimant asserts the administrative law judge reduced the entry on April 18, 2010, from 2.1 hours to .5 hour. In actuality, the administrative law judge reduced the request by .5 hour and awarded 1.6 hours for the task. Given the administrative law judge’s reasoning, such reductions were not “inconceivable.” Cl. Br. at 6; *see also* Cl. Br. at 7-9.

⁵ Challenging one of the administrative law judge’s reasons for deducting time from an entry, when he gave multiple reasons, does not establish the reduction was in error. Further, generally citing entire pages as having “arbitrary” or “mistake[n]” reductions, Cl. Br. at 7, does not establish an abuse of discretion.

specifically addressed the lack of supporting documents, Claimant filed a reply; however, he did not address costs in his reply brief. The administrative law judge declined to reimburse costs or give Claimant another chance to supplement the fee petition. Costs under the Act must be reasonable and necessary. 33 U.S.C. §928(d); 20 C.F.R. §702.135. They are within the administrative law judge's discretion to award. *See generally Picinich v. Lockheed Shipbuilding Co.*, 23 BRBS 128 (1989) (Order). Claimant did not avail himself of the opportunity to establish his expenses were reasonable and necessary and has not established the administrative law judge abused his discretion by denying an additional opportunity. *See Hudson v. Ingalls Shipbuilding, Inc.*, 28 BRBS 334 (1994) (not an abuse of discretion to deny further amendment to fee petition).

Finally, we reject Claimant's assertion that the administrative law judge erred in reducing his fee by 90% due to his limited success. As addressed above, Claimant was successful only in obtaining approximately \$1,500 in his medical benefits claim for his dental injury. *Hensley* states if the plaintiff achieved only partial or limited success, the product of the lodestar may result in an excessive award; the fee award, however, should be for an amount that is reasonable in relation to the results obtained. *Hensley*, 461 U.S. at 435-436. The Supreme Court stated there is "no precise rule or formula" and the adjudicator "may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success." *Id.* at 436-437. The administrative law judge rationally found Claimant's claim was mostly unsuccessful and, consequently, reduced counsel's fee as is within his discretion. *See, e.g., Hill v. Director, OWCP*, 195 F.3d 790, 33 BRBS 184(CRT) (5th Cir. 1999), *cert. denied*, 530 U.S. 1213 (2000); *Berezin v. Cascade Gen., Inc.*, 34 BRBS 163 (2000); *Fagan*, 33 BRBS at 93-94; *Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (1999).

As Claimant has not established an abuse of discretion, counsel's fee is commensurate with the results obtained, and as the "courts need not, and indeed should not, become green-eyeshade accountants[.]" we reject Claimant's challenges. *See Fox v. Vice*, 563 U.S. 826, 838 (2011); *Welch*, 23 BRBS 395; 20 C.F.R. §702.132. We affirm the administrative law judge's fully-explained fee award. *Fagan*, 33 BRBS at 94; *Welch*, 23 BRBS at 402.

Accordingly, we affirm the administrative law judge's Supplemental Decision and Order Awarding Fees.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge